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**UTAH LABOR COMMISSION**

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**T. KAY FARLEY,**

**Petitioner,**

**vs.**

**R C WILLEY HOME FURNISHINGS  
and WORKERS COMPENSATION  
FUND,**

**Respondents.**

**ORDER AFFIRMING  
ALJ'S DECISION**

**Case No. 04-0747**

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T. Kay Farley asks the Utah Labor Commission to review Administrative Law Judge Marlowe's dismissal of Ms. Farley's claim against R C Willey Home Furnishings and its insurance carrier, Workers Compensation Fund, (referred to jointly as "R C Willey" hereafter) for permanent total disability compensation under § 34A-2-413 of the Utah Workers' Compensation Act.

The Labor Commission exercises jurisdiction over this motion for review pursuant to § 34A-2-801(3) of the Utah Workers' Compensation Act and § 63G-4-301 of the Utah Administrative Procedures Act.

**BACKGROUND AND ISSUE PRESENTED**

Ms. Farley claims permanent total disability compensation for a knee injury suffered while working for R C Willey on December 17, 2001. After an evidentiary hearing, Judge Marlowe concluded that, because Ms. Farley had returned to permanent light-duty work at R C Willey after her knee injury, Ms. Farley was "gainfully employed" within the meaning of § 413(1) (c) (i) of the Utah Workers' Compensation Act and, therefore, was not entitled to permanent total disability compensation.

In asking the Commission to review Judge Marlowe's decision, Ms. Farley argues that her post-injury work at R C Willey does not constitute "gainful employment" as that term is used in § 413 (1) (c) (i) of the Act and should not disqualify her from receiving permanent total disability compensation.

**FINDINGS OF FACT**

The Commission adopts Judge Marlowe's findings of fact. As material to the issue raised by Ms. Farley's motion for review, the facts can be summarized as follows.

Ms. Farley was employed by R C Willey as a commissioned sales person, working 32 hours and earning \$750 per week. On December 17, 2001, she injured her left knee in a work-related

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accident. Ms. Farley achieved medical stability from her work injury by April 2004 and was left with a 10% whole-person impairment from the injury. She returned to work at R C Willey in several different sales positions but could not tolerate the physical demands of those assignments. Ultimately, she accepted a sedentary clerical position for the company, where she works 30 hours per week at a wage of \$12.17 an hour.

**DISCUSSION AND CONCLUSION OF LAW**

There is no dispute that Ms. Farley's work-related knee injury is compensable under Utah's workers' compensation system. The only issue in dispute is whether Ms. Farley is entitled to permanent total disability compensation for that injury. Subsections 413(1) (b) and (c) of the Utah Workers' Compensation Act establish several tests that injured workers must satisfy in order to qualify for permanent total disability compensation. The focus in this case is on subsection 413 (1) (c) (i), which requires that an injured worker establish he or she is not "gainfully employed."

The Commission does not interpret the term "gainful employment" as used in subsection 413 (1) (c) (i) as including **any** paid work, no matter how limited, poorly paid, or uncertain. To consider such tenuous work as "gainful employment," so as to cut off the injured worker's ability to claim permanent total disability compensation, would be inconsistent with other provisions of § 413 and contrary to the objectives of the Act. But on the other hand, the term "gainful employment" has been placed in the statute for a purpose—it cannot be applied so narrowly as to render it meaningless. With these considerations in mind, the Commission turns to the application of subsection 413 (1) (c) (i)'s "gainful employment" test to the circumstances of Ms. Farley's claim.

The evidence establishes that Ms. Farley is now working almost the same number of hours each week that she worked prior to her work injury. There is no indication that this is a "make-work" situation, or that the work is temporary or uncertain in nature. Ms. Farley's work also pays a substantial wage, although less than her pre-accident earnings.<sup>1</sup> Under these circumstances, the Commission concludes that Ms. Farley is gainfully employed within the meaning of subsection 413 (1) (c) (i) and, therefore, is not entitled to permanent total disability compensation.

As a final matter, the Commission notes Ms. Farley's suggestion that, even if she does not meet § 413's requirements for permanent total disability compensation, the Commission should nevertheless conclude that she is entitled to permanent total disability compensation under the "odd lot" doctrine. Under the "odd lot" doctrine:

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<sup>1</sup> In cases such as this, which do not qualify for permanent total disability compensation under § 413, the workers' compensation system accounts for the difference between pre-accident and post-accident earnings by providing permanent partial disability compensation pursuant to § 412. The record indicates that Ms. Farley has received \$12,162.24 in permanent partial disability compensation.

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[a]n employee who is so injured that he or she can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist, may well be classified as totally disabled.

(*Larson's Workers' Compensation Law*, "Odd Lot Doctrine," Vol. 4, § 83.01; quoting *Lee v. Minneapolis St. Ry.*, 41 N.W. 2d 433, 436 (Minn. 1950).)

The Commission notes that the evidence submitted in this case is insufficient to satisfy the requirements of the "odd lot" doctrine. But more importantly, the Utah Legislature's enactment of § 413 of the Workers' Compensation Act has established the specific elements that determine whether an injured worker is entitled to permanent total disability compensation. And as already noted, Ms. Farley has not satisfied the statutory requirement of subsection 413(1) (c) (i) by showing she is not gainfully employed.

**ORDER**

The Commission affirms Judge Marlowe's decision. It is so ordered.

Dated this 24<sup>th</sup> day of February, 2009.

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Sherrie Hayashi  
Utah Labor Commissioner

**NOTICE OF APPEAL RIGHTS**

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.